No. 14897.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and MARIAN S. HAYWARD,

Appellants,

vs.

G. de BRETTEVILLE, TREASURE COMPANY, WALTER B. SCOVILLE and THE ADAMANT COMPANY,

Appellees.

G. de BRETTEVILLE and TREASURE COMPANY,

Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,

Appellees.

Opening Brief of Appellants Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward.

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Appellees.

Opening Brief of Appellants Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward.

Statement of the Case.

This case involves the question of whether or not an agreement to pay a sum of money "out of" production from an oil well creates a lien upon or other security interest in that portion of production owned by the persons who made the agreement. There is also a question as to whether or not that issue is *res judicata,* and a further question of whether one of the parties against whom relief is sought is bound by the agreement.

The appeal is from a judgment dismissing a complaint in intervention, whereby the appellants sought payment of the amount due under the agreement out of a fund held by the Court, representing the value of production owned by the parties to the agreement. This fund arose from the condemnation of the property by the Federal Government.

A brief history of the events out of which the controversy arises is as follows:

Treasure Company was the lessee under an oil and gas lease of certain property in the City of Los Angeles. It commenced drilling a well and ran out of money. An agreement was entered into by Treasure Company with the appellees in this appeal, the plaintiffs below, Walter B. Scoville and The Adamant Company, wherein Scoville and The Adamant Company agreed to provide certain funds to continue drilling, in consideration of which each was to receive participating royalties entitling them to payment of a certain percentage of the proceeds of sale of oil and gas produced from the property, after the payment of expenses.

This agreement provided for an executive committee to conduct operations on behalf of the parties to the agreement. This committee, at the time with which we are concerned, consisted of G. de Bretteville, President of Treasure Company, Harry Wynn, an employee of Treasure Company, and J. Orville Seeple, who was representing Scoville and The Adamant Company, and who had actual charge of drilling.

Scoville and The Adamant Company paid the agreed amount, and drilling was resumed, but the funds proved

insufficient, and additional financing was required. Scoville undertook, on behalf of himself and The Adamant Company, to raise additional funds. He approached the appellants, and suggested that they provide some money for completing the well. He represented to the appellants that his group was in control of the property, through the executive committee, and that they owned a majority of the production. [Tr. 131, 144.]

The appellants invested a total of $5,000.00, being $2,500.00 for Mr. Bullen and $2,500.00 for Dr. Hayward. The terms of the investment are set forth in a letter dated September 27, 1938, written by one of the appellants, Herschel Bullen, to George Halverson, an attorney, who was at that time representing Scoville and The Adamant Company in a dispute with de Bretteville and Treasure Company. Scoville and The Adamant Company signed an endorsement on this letter agreeing to its terms, which were that the appellants, in addition to receiving assignments of two 1% participating royalties, were to receive $5,000.00 each, or an aggregate of $10,000.00, "out of the first 15% of production from the said well." A copy of this letter agreement of September 27, 1938, the so-called "two for one agreement," is Exhibit A of the complaint in intervention, and is set forth at pages 78 to 81 of the printed transcript. It is also Exhibit B-1 of plaintiffs in intervention.

These terms were not the result of bargaining between Scoville and the appellants. He made the same proposal to them as he made to other investors, that is to say, that they would be repaid their money out of 15% of production, and that he would, in addition, assign to them from his holdings a 1% participating royalty for each $2,500.00

invested. In fact, the appellants were concerned about whether the transaction could be considered usurious, and were advised that it was not, because the payment was contingent upon the well being successful, and there was no obligation of anyone to pay the money within a certain time, or in any event. It was payable only out of production from a well, which was not then producing and might not produce.

The appellants paid over $2,500.00 each, or a total of $5,000.00, and this money, together with other funds, and credits which were obtained from supply houses, enabled operations to start again, and the well was completed and placed on production in December of 1938. This was done under the management of the executive committee, although shortly thereafter Treasure Company took possession.

Treasure Company continued to operate the well. The gross production of oil and gas therefrom amounted to over $200,000.00. No part of the gross production was applied to payment of the $10,000.00 which was to be paid out of 15% of such gross production to the appellants under their agreement, and they have received no payment from any other source. It should be said, perhaps, in this connection that appellants at one time sold their rights under the two for one agreement and their royalties, the sale being made under a conditional sales contract, and they received some money under the contract, but the buyer thereafter defaulted, and all rights were restored to the appellants. [Tr. 148-149.] No payments on account of the obligation to pay $10,000.00, as set forth in the letter agreement, were ever made by anyone, and the Court so found. [Finding XII, Tr. 106.]

The appellants have also received no payments on their 2% participating royalties, which were assigned to them by Scoville, nor have Scoville and The Adamant Company received any payments on their royalties. de Bretteville, President of Treasure Company, has maintained, successfully, that the expenses of operation, including large legal fees in his litigation with Scoville and The Adamant Company, have used up all the money which would otherwise have been payable to them and their assigns. As to the two for one agreement, he contended that he knew nothing about it, and both Judge Westover in the condemnation case, and Judge Yankwich in the case at bar, found that Treasure Company was not bound by it. [Finding XI, Tr. 106.] That finding is not questioned by the appellants.

On September 10, 1941, Scoville and The Adamant Company brought a suit in the Federal Court, being the case at bar, seeking an accounting for any sums due upon their royalty interests from past production, and for repayment of the sum of $13,000.00, included in which was the $5,000.00 put up by these appellants, which Scoville and The Adamant Company had advanced for the completion of the well, and which they claimed was done under an agreement by Treasure Company to repay it two for one out of 15% of gross production.

In the meantime, and on September 28, 1942, the Government of the United States instituted a condemnation proceeding for the use of Reconstruction Finance Corporation, to condemn certain real property, included in which was the property covered by the oil and gas lease held by Treasure Company, upon which Treasure Well No. 8 was

invested. In fact, the appellants were concerned about whether the transaction could be considered usurious, and were advised that it was not, because the payment was contingent upon the well being successful, and there was no obligation of anyone to pay the money within a certain time, or in any event. It was payable only out of production from a well, which was not then producing and might not produce.

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drilled. Scoville and The Adamant Company, and the appellants Bullen and Hayward, were made parties defendant in that action, and an award was made for the value, at the date of condemnation, of future production from the well, owned by the lessee and the participating royalty holders.

The parties petitioned for the distribution of their respective shares of this award, and the appellants asserted a lien or a security interest in the nature of a trust deed upon the interest of the lessee, Treasure Company, and upon the royalty interests of Scoville and The Adamant Company, under the letter agreement of September 27, 1938, and requested payment of the $10,000.00 out of the award.

The trial court in that case found that the agreement with appellants was made by Walter B. Scoville, and that neither Treasure Company nor The Adamant Company was a party to or was bound by it, and the Court also adopted a conclusion of law as follows:

> "The enforcement of the so-called 'two for one agreement' between the Bullens and Haywards and Walter B. Scoville is a personal matter, and is not a matter for settlement in the within case."

All parties appealed from the judgment in that case. *United States v. Adamant Company, et al.,* 197 F. 2d 1. The holding of the trial court that the lessee was not bound by the two for one agreement was affirmed, and this Court also held that the rights of the lessee were properly subject to adjudication and to payment in the condemnation case, and ordered payment to Reconstruction Finance

Corporation, as assignee of the lessee, of the value of the lessee's interest, $97,767.00.

In its discussion of the two for one agreement, the Court indicated its concurrence in the view of the trial court that the rights created thereunder were personal, but the Court did not mention the question of whether or not it could be specifically enforced against the interests of any royalty holder who was a party to it in an action against such royalty holder.

As to the royalty holders, the Court held that they were analogous to stockholders in a corporation, and that their rights would have to be determined in accounting suits which had already been instituted by royalty holders against the lessee, the case at bar being one of them. The portion of the award attributable to the percentages of production held by the royalty holders was ordered to be held by the Court pending the outcome of the accounting suits, and it is now held in the registry of the Court. The amounts so held with which we are concerned are as follows:

Adamant Company	$47,925.00
Walter B. Scoville	30,672.00
H. Bullen and Mary H. Bullen	1,917.00
J. C. Hayward and Marian S. Hayward	1,917.00

Following that decision, the appellants asked leave to intervene in the accounting action, seeking, among other things, the payment of the $10,000.00 owed to them out of the money, listed above, which now stands in lieu of the royalty interests of the parties to the agreement. The District Court, by Judge Peirson M. Hall, granted the motion for leave to intervene.

The question of the nature of the two for one agreement, whether it was personal only, or whether it created a lien against the share of production owned by the parties to it, and also whether or not the comments upon the nature of the two for one agreement made by this Court in the condemnation case, were controlling in this action, were briefed and argued before Judge Hall. In a memorandum opinion [Tr. 63], Judge Hall ruled that under the agreement the appellants had a remedy to reach the *res*, *i.e.,* the money standing in lieu of Scoville's royalty interest, that the *res* did not come into being until final judgment in the condemnation action, that enforcement of the agreement was consequently not barred by the statute of limitations, and, also, that the statements by this Court in the condemnation case were not the law of the case, and did not preclude the intervention of the appellants in this case.

A complaint in intervention was thereupon filed by these appellants. In one cause of action they joined with the plaintiffs, Walter B. Scoville and The Adamant Company, in the request for an accounting by the defendant, Treasure Company, of any net amounts from past production which might be due upon their participating royalties, a 1% participating royalty, as noted above, being held by each of the appellants. The trial court found that no money was due from past production, and there is no appeal on that point, either by the plaintiffs Scoville and The Adamant Company, or by these appellants, the plaintiffs in intervention.

In a second cause of action, the appellants asked the Court to determine that they are entitled to have paid to

them the shares of the award in the condemnation action representing the value of their participating royalties, to wit, $1,917.00 to Herschel Bullen and Mary H. Bullen, and $1,917.00 to J. C. Hayward and Marian S. Hayward. The judgment authorized payment of these amounts, and there is no appeal by anyone from that part of the judgment.

By their third cause of action, the appellants asserted against the plaintiffs, Scoville and The Adamant Company, defendants in intervention and appellees here, the right to subject their shares of the money award, which stand in lieu of the royalty interests of said appellees, to payment of the amount due under the two for one agreement. The case was tried by Judge Leon R. Yankwich, who had written the opinion in the condemnation appeal, *United States v. Adamant Company,* 197 F. 2d 1, and he held in this case that the two for one agreement created only a personal obligation, that it was not specifically enforceable against royalty interests of the parties to it, and that the action was, therefore, barred by the four-year statute of limitations. The judgment authorized the distribution to Walter B. Scoville of his share of the award, $30,672.00, and to The Adamant Company of its share, $47,925.00, without deduction by any lien or charge in favor of appellants. It is not clear from the findings whether or not Judge Yankwich intended to follow Judge Westover's finding in the condemnation case that The Adamant Company was not a party to the agreement. This appeal is from that part of the judgment which denied enforcement of the two for one agreement as a lien or charge in the nature of a trust deed on the portions of the award belonging to Scoville and The Adamant Company.

Questions Involved.

(1) UNDER THE AGREEMENT FOR THE PAYMENT OF $10,000.00 OUT OF PRODUCTION FROM THE WELL, DID THE INTEREST IN PRODUCTION OWNED BY THE PARTIES TO THE AGREEMENT STAND AS SECURITY FOR PAYMENT OF THE $10,000.00?

(2) DID THE STATEMENTS BY THIS COURT IN THE CONDEMNATION CASE THAT THE AGREEMENT WAS A PERSONAL ONE CONSTITUTE A HOLDING ON THE QUESTION OF THE RIGHT TO ENFORCE IT AGAINST THE ROYALTY INTERESTS OF THE OBLIGORS THEREUNDER; AND, IF SO, IS THE POINT RES JUDICATA OR THE LAW OF THE CASE?

(3) IS THE COMPLAINT IN INTERVENTION SEEKING TO ENFORCE THE TWO FOR ONE AGREEMENT AGAINST THE INTEREST IN PRODUCTION OWNED BY SCOVILLE AND THE ADAMANT COMPANY BARRED BY THE STATUTE OF LIMITATIONS?

(4) DID THE ADAMANT COMPANY SIGN THE TWO FOR ONE AGREEMENT BY AN AUTHORIZED OFFICER, AND IS THE FINDING, IF THERE IS SUCH A FINDING, BY THE COURT BELOW, TO THE EFFECT THAT IT DID NOT, ERRONEOUS?

(5) IS THE PURPORTED FINDING BY THE COURT IN THE CONDEMNATION CASE THAT THE ADAMANT COMPANY WAS NOT BOUND BY THE TWO FOR ONE AGREEMENT RES JUDICATA?

ARGUMENT.

I.

The Agreement Under Which the Appellants Were to Receive $10,000.00 Out of the Gross Production From Treasure Well No. 8 Is Enforceable Against That Part of Production Owned by the Persons Who Were Parties to the Agreement.

The basic question is whether the agreement for payment of $10,000.00 was merely a personal undertaking to pay a sum of money giving rise only to an action in debt, or for damages, against the obligor, if not paid, or whether it was secured by the interest of the obligors in the oil well, so that an action will lie in equity to apply the security to payment of the obligation. It would seem that this is simply a question of the legal effect of the language used in the agreement.

The language is quite simple. The agreement is in the form of a letter from Herschel Bullen to George Halverson, a Los Angeles attorney, who was also representing Scoville and The Adamant Company. [Tr. 171, 174.] The letter enclosed an application to the Commissioner of Corporations for consent to transfer the two 1% participating royalties, which the appellants also received in the transaction, and two $2,500.00 cashier's checks. It authorized the use of the checks when certain conditions were complied with, and stated:

> "These funds, $5,000.00, to be included in the said necessary funds, to be repaid two for one out of production—to fully comply with paragraph II of page 2 of said application herewith enclosed, it being understood and agreed that the said two for one out of production is to be repaid out of the first 15% of gross production from the said well."

The letter bears an endorsement reading:

"We agree to the foregoing.",

which was signed by Walter B. Scoville and by The Adamant Company, by Helen Scoville, Secretary. [Tr. 81.] The endorsement was also signed by The Walter B. Scoville Company, this being for the reason that the agreement provided that in the event the well was a failure, the appellants were to receive comparable interests in certain properties in Wyoming. These properties were owned by The Walter B. Scoville Company. [Tr. 183.]

The agreement thus, in explicit terms, shows that the parties were interested in property rather than personal obligations. There was no agreement by anyone to pay the money in any event. It was to come from the well in question if it was a producer, otherwise from the Wyoming property. The agreement contains no language to the effect that payment was to be merely measured by or equal to a percentage of production from the well, or that the reference to a percentage of production was only intended to fix the time when the money would be paid. Payment was to come "out of" such production.

The effect of such an agreement was decided in early times. For example, in *Legard v. Hodges,* 1 Ves. Jun. 477, 29 English Reports Chancery, 684 (1792), the defendant, Anthony Hodges, at the time of his marriage, made a covenant that he would pay into the hands of the plaintiffs, as trustees, the sum of 10,000 pounds, and that "he would, after three years from the solemnization of the marriage, set apart an appropriate amount as a fund toward raising said 10,000 pounds, one-third part of the yearly rents *arising from* his several estates in Berks

and Oxford . . ." (Italics added.) The money was not paid, and plaintiffs filed a bill in equity charging that the produce of the estate ought to be accounted to them, and one-third part thereof applied for the purpose of raising the 10,000 pounds, and praying an account of rents and profits received from the estates.

Mr. Mansfield and others for the defendants argued (p. 686 of 29 English Reports) that "the covenant is merely a personal covenant by Hodges to appropriate the third part of the produce to the payment of the 10,000 pounds. An action would lie for the breach of it, and in such action damages to the amount of the third part might be recovered. But the estate itself is not bound by the covenant; there is no lien upon the estate itself." The Court held for the plaintiffs, and the Lord Chancellor, after distinguishing a case cited by the defendants, said at page 687:

> "I take the doctrine to be true, that where the parties come to an agreement as to the produce of the land, that the land itself will be affected by the agreement."

This result has been uniformly reached by the Supreme Court of California in determining the effects of assignments and agreements relating to shares in oil production, though not without contrary holdings in the lower courts. In one of the earlier cases, *Western Oil & Refining Co. v. Venago Oil Corp.,* 218 Cal. 733, 24 P. 2d 971 (1933), Miller, the lessee under an oil lease, rented some drill pipe from one of the appellants. As part consideration he assigned to the appellant outright 2% of all oil and gas to be produced. In addition, he agreed to pay a cash rental, and he assigned to appellant 10% of

the oil and gas produced, as security for payment of the rental. Thereafter the lessee transferred his lease to the defendant Venago Oil Corporation, which had notice of the assignments, but refused to honor them. The question arose in an interpleader action wherein the plaintiff, Western Oil & Refining Co., which held a cash fund resulting from the sale of oil and gas from the property, interpleaded the defendant Venago Oil Corporation, which had produced the oil, and the appellants, who claimed their percentages of the production under the assignments from Miller. It will be noted that while the documents in this case were in the form of assignments of certain percentages of oil and gas to be produced, they assigned oil "to be produced, saved, and sold," so that they necessarily operated only as an agreement by the lessee to pay over a certain percentage of the proceeds of the sale of such oil and gas. The royalty holders had no rights of possession, and could look only to the lessee, their assignor, to produce the oil, and give them their respective percentages. Because of this, the trial court, Hon. Leon R. Yankwich, then a Judge of the Superior Court of California, interpreted the documents as being, in effect, only personal covenants of the lessee, and held that the appellants had no interest in the specific cash proceeds derived from the sale of the oil. This judgment was reversed by the Supreme Court. The Court, at page 737 of the California report, and page 973 of the Pacific report, said:

> "We cannot accede to the trial court's view that the instruments were merely personal undertakings of Miller to pay appellants percentages of the proceeds of oil produced by him individually."

A difficulty which the California courts have had in treating a purported assignment of a percentage of oil to be produced as giving a property interest, is that in California the "oil in place" doctrine is not followed, and it is considered that even the landowner does not have title to the fugitive substance while it is underground. This difficulty was met in the *Venago* case by a reference to the "potential possession" theory of personal property to be produced from land as giving a present transferable interest in the property to be produced in the future.

In *Callahan v. Martin,* 3 Cal. 2d 110, 43 P. 2d 788, the Court stated that the potential possession theory had been abolished by the adoption of The Uniform Sales Act in California, but nevertheless held that an assignment of a percentage of oil to be produced created a property interest. This was on the theory that it was a *profit a prendre.* Later, in *Schiffman v. Richfield Oil Co.,* 8 Cal. 2d 211, 64 P. 2d 1081 (1937), where the instruments gave a share of the *net proceeds of sale* of oil and gas, and were made by the lessee of an oil lease, the Court reached the same result as in *Venago* and *Callahan,* although the theory in this case was simply that the royalty holder should be considered in equity as the owner of a property interest, because he should be entitled to specific performance. The Court said at page 228 of the report in 8 Cal. 2d:

> "The equitable doctrine of specific performance and equitable conversion as applied to contracts to buy and sell land, arose from the inadequacy of the remedy of damages due to the unique character of the subject matter of the contract. In the case of royalty assignments the uncertainty in amount and

value of the oil to be produced renders the subject of the contract unique."

As late as 1941, the Court was still uncertain as to theory, but unshaken in its view that instruments purporting to transfer oil to be produced, or the proceeds thereof, gross or net, in whatever form and whether created by landowner or lessee, and whether or not the holder had a right to enter and take the oil himself, gave a property interest. Finally, in *La Laguna Ranch Co. v. Dodge,* 18 Cal. 2d 132, 114 P. 2d 351 (1941), the Court, after discussing royalties of various types, and after adverting to the fact that ordinarily a royalty holder, unlike a lessee, has no right of possession and hence cannot be said to have a *profit a prendre,* held that he has an anologous right, saying at page 139 of the report in 18 Cal. 2d:

". . . the interests thus created have been considered *sui generis,*"

and, on the same page,

". . . the purpose and scope of all such royalty interests are so similar that all should be considered equally to be incorporeal interests in real property . . ."

The same result has been reached where the assignment is of an interest of limited duration and made to secure the payment of a fixed sum of money. As noted above, one of the assignments in the *Venago* case was of this nature, and in a later case, *Recovery Oil Co. v. Van Acker,* which was before the District Court of Appeal on two occasions, reported in 79 Cal. App. 2d 639, 180 P. 2d 436, and 96 Cal. App. 2d 909, 216 P. 2d 483 (hear.

den. by S. Ct. June 8, 1950), the only assignment involved in the case was for security. In this case, certain people held a prospecting permit authorizing them to explore for oil on land owned by the United States. They executed a document reading in part as follows:

> "The undersigned hereby assigns, transfers and sets over to N. E. Grable the proceeds from Fifteen per cent (15%) of the oil, gas and other hydrocarbon substances produced, saved and sold from the said premises so covered by said Operating Agreement (less amount used in operations on the premises), until such time as said assignee shall have received the sum of Twenty Thousand Dollars ($20,000.00) and no more; and upon full payment of said sum this assignment shall terminate and be at an end." (79 Cal. App. 2d at 640.)

Thereafter the holder of this assignment transferred a half interest in it, and in the obligation secured thereby, to one of the defendants. The interest of the original permit holders was acquired by the plaintiff corporation, which brought a quiet title suit seeking, among other things to quiet its title against the rights of the holder of said assignment. The argument of the plaintiffs as to the effect of the assignment is set out at page 642 of 79 Cal. App. 2d, and page 438 of 180 P. 2d:

> "Plaintiff points out that the instrument before us assigned a portion of the *proceeds* from the oil, gas and other substances produced from the leased property, while that involved in the Callahan case assigned an interest in the oil and gas produced. From this they argue that the assignment can be construed to be no more than a promise on the part of the assignor to pay the assignee a sum of money out of a specific fund and that at most it could only be

> construed as creating a lien on the oil produced, which lien has long since been barred by the statute of limitations."

The Court did not deny that the only practical effect of the assignment could be an agreement by the operator to pay over a sum of money, but nevertheless held that its legal effect, under the California cases, was the assignment of a property interest to secure the indebtedness. The Court further held, apparently in reliance upon the cases holding that instruments purporting to sell oil to be produced in the future give a present *legal* interest, that the holder of the assignment given for security had a *legal estate* in the nature of a trust deed. It was also held that the fact that past production had been sufficient to pay the debt was immaterial, if it had not been so applied. The Court said at page 485 of the report in 216 P. 2d:

> "The assignments by which the respondent acquired her interest assigned to her a certain share in the production from the land until such time as she received $10,000.00. Her interest was to terminate when she received this amount, otherwise it would run for the full term of the lease. No date was fixed for the termination of her interest, and it was conditioned upon her receiving the money, and not upon the production of an amount sufficient to pay the money. Any obligation to pay was not only a continuing one but she had an interest in the land which did not terminate until she actually received that amount of money. Her interest was vested as an estate, and not as a lien. Her position was similar to that of the holder of a trust deed."

This case, we submit, is decisive of the case at bar, if California law is to be followed.

It is true that in the *Van Acker* case the instrument purported to be a present assignment, although it could obviously have only the practical effect of an agreement, whereas in the case at bar the instrument is in form an agreement. This is a distinction without a difference. Where the agreement is such that the later formal document would add nothing to it, it is to be treated as if it were a formal transfer, and if it relates to an interest in oil to be produced, under California law it gives a present legal interest. In *Gavina v. Smith,* 25 Cal. 2d 501, 154 P. 2d 681, the plaintiffs executed an agreement with the defendant wherein the defendant, in consideration of the payment of $100.00 to the plaintiff, was given an option to acquire an oil and gas lease on certain property, the lease to be in a form attached to the agreement. Defendant exercised the option, but the plaintiff refused to sign the lease. This was an action by the plaintiffs to quiet title to the property against the defendant's rights under the contract. There was a judgment for the plaintiffs, which was reversed by the Supreme Court of California. The plaintiffs' theory is shown by the following statement in the opinion at page 682 of the Pacific report:

> "Plaintiffs contend that upon the exercise of the option defendant had merely an executory contract to make a lease; that although an executed lease would be a good defense to a quiet title suit, an executory contract that is not specifically enforceable is no defense to such a suit; and that the present contract is not specifically enforceable on the ground of lack of mutuality of remedy."

But the Court said, at pages 682-683:

> "Where the parties, however, have agreed in writing upon the essential terms of the lease, there is a

> binding lease, even though a formal instrument is to be prepared and signed later."

The Court further held that an agreement to lease, being the equivalent of a lease, created a legal interest in the oil rights, just as a lease would, saying at page 683:

> "It is settled in this state that an oil lease like the one in the present case creates a *profit a prendre* and vests in the lessee an estate in real property . . . It is immaterial whether the defendant could get a decree for specific performance if he sought it, for he has a legal interest in the property and legal remedies to enforce it independently of the remedy of specific performance. (Citations.)"

The rule announced in *Gavina v. Smith,* coupled with the decision of the Court in the *Van Acker* case, would seem to require the holding, under California law, that the agreement in our case gave a vested legal estate by way of security to the appellants covering such property rights in the well as were owned by the parties who executed the agreement. If, however, the document is treated as merely an agreement, which did not pass a present title, it would, nevertheless, create rights in the property which would be enforceable in a court of equity, and this result could not be avoided merely by designating the agreement as a personal covenant.

In *Dougherty v. California Kettleman Oil Royalties,* 9 Cal. 2d 58, 69 P. 2d 155 (1937), the plaintiff, Dougherty, made an agreement with one Ochsner, under which Ochsner was to apply to the Federal Government for a lease of oil land, and Dougherty, in consideration of his services in advising Ochsner, was to receive 10% of the oil and gas produced. A written contract was submitted,

which Ochsner agreed to, but never signed. Ochsner obtained the lease, and through various assignments thereof it came to the defendant corporation, California Kettleman Oil Royalties, and later by mesne assignments to General Petroleum Corporation. General Petroleum Corporation acquired the property without any knowledge of the agreement with Dougherty. However, the defendant corporation, California Kettleman Oil Royalties, did have knowledge when it acquired the property, and, in its assignment to General Petroleum Corporation, it reserved a royalty interest, though less than 10%. Dougherty's agreement with Ochsner was held to be enforceable against the defendant corporation to the full extent of its royalty interest. It was held that the agreement, having been fully performed on the plaintiff's part, was not subject to the statute of frauds, and that even though it was a mere personal covenant, it was enforceable against Ochsner and his assigns with knowledge. Here, again, the Court treats an assignment and an agreement as being the same. At one point in the opinion it speaks of an interest which Ochsner had "assigned" to Dougherty. It is clear, however, that the Court realized that the matter rested merely in an agreement. The Court said at page 167 of the report in 69 P. 2d:

> "The contract was that Ochsner should hold the title to the permit, deal with it, and should pay Dougherty his agreed share. Dougherty had no cause of action until Ochsner repudiated this agreement."

Again, at page 169 of the Pacific Report, the Court said:

> "All of the pleadings allege an oral agreement the consideration for which was certain services rendered by Dougherty."

On the question of the agreement being a personal covenant, the Court said at page 167 of the Pacific report:

> "Even if the covenant on the part of Ochsner were a mere personal covenant it would be enforceable in equity against those who took with notice. (Citations.)"

This case clearly shows that under the law of California, as well as under the law generally, the case cannot be disposed of merely by finding that the agreement was a personal covenant by the parties who signed it.

The *Kettleman* case dealt with a continuing interest, an agreement to sell, but the case is even stronger where the agreement is made as security. The application of this principle to a similar situation is exemplified by the case of *Phillips Petroleum Co. v. Gable,* 128 F. 2d 943. This case appears to be on all fours with the case at bar. In the cited case Dixie, the operator of an oil well, bought some casing from plaintiff, and agreed to pay a certain sum for it "*out of* the first proceeds of one-half of Dixie's present interest in the production from said well." (Italics added.) The question involved was the rights of the holder of this agreement as against other creditors of Dixie. The Court held that the holder of the agreement had an equitable lien, and would prevail over the other creditors, saying at page 944:

> "The contract gave Phillips an equitable lien upon one-half of Dixie's 30 per cent interest in the first proceeds from production from the well. (Citing cases.) The recording of the contract gave Morris constructive notice of the equitable lien, and required it to make reasonable inquiry. Had it done so, it would have discovered the Phillips lien and learned the debt secured thereby had not been fully paid."

The *Phillips* case was distinguished in the discussion of equitable liens in *United States v. Adamant Co.,* on the ground that it was based upon an Oklahoma statute. This statute is set forth in the opinion in 197 F. 2d at page 9. The Court considered it to be a statutory enactment of the doctrine of potential possession. The Court then refers to the California cases which relied on a similar doctrine, including the *Venago* case, and says at 197 F. 2d 10:

> "But these cases arose prior to the adoption of the present Section 1725 of the California Civil Code in 1931. And, the Supreme Court of California has stated that the effect of the adoption of this Section is to abolish the doctrine of potential possession in California. *Callahan v. Martin,* 1935, 3 Cal. 2d 110, 128, 43 P. 2d 788, 101 A. L. R. 871."

The Court, in this statement, overlooked the point that Section 1725 of the Civil Code relates only to sales, and that there is a California Code section still in effect relating to liens, which is precisely the same as the Oklahoma statute to which the Court referred as supporting the *Phillips* case. In justice to the Court, it should be said that this section was not called to its atention. It is Section 2883 of the Civil Code, and reads as follows:

> "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest."

Thus it would appear that the security interest involved here can be analyzed under California law either as a legal

transfer of the royalty interests of the obligors in the nature of a trust deed, or as a lien upon such royalties. Such estate or lien, as the case may be, continues until the money which it secures has been paid, regardless of whether or not there has been production in the past which would have been sufficient to pay the debt, if it had been applied to it. This point is clearly made both in the *Van Acker* case and in the *Phillips* case.

It also appears, however, that if any specific proceeds of production can be identified, they will be applied to satisfaction of the obligation, as was held in the *Venago* case, which involved money held by a purchaser of the oil, who interpleaded the conflicting claimants to it. In the case at bar, we have money held by a stakeholder which was derived from a forced sale of the royalty interests, and whether it be regarded as merely a substitute for the royalty, or as proceeds of production, the "trust deed" or "lien", as the case may be, equally applies to it.

It is also submitted that under the decisions where money is to be paid with funds "arising from" the production of land, as in *Legard v. Hodges,* or is to be paid "out of" such production, as in *Phillips Petroleum v. Gable,* the document, as a matter of law, is to be interpreted as giving a security interest in the land and the production therefrom. It is submitted, further, that the circumstances under which the document was executed, including the representations made by Walter B. Scoville, and subsequent letters written by the parties, reinforce, rather than rebut, this intention.

The trial court in this case adverted to certain letters written by one of the appellants, Dr. Hayward, as

strengthening the Court's conclusion that the agreement was a personal one. Before discussing those letters, we wish to make it clear that in this case we are not contending that the interest of Treasure Company, the lessee's interest which was assigned to Reconstruction Finance Corporation, is bound by the two for one agreement. de Bretteville, President of Treasure Company, testified in this case, as in the condemnation case, to the effect that he did not agree to the two for one arrangement with the appellants, and knew nothing about it at the time the money was paid in. [Tr. 215-218, incl.] In the condemnation case, this Court affirmed the holding of the trial court that Treasure Company was not a party to the agreement, and was not bound by it, and directed the payment to Reconstruction Finance Corporation of the lessee's share of the award, free of any lien of the two for one agreement, and free from any lien of the participating royalty holders for past production. That judgment is final, and the money has been paid over. Consequently we did not contend, at the argument or in the brief filed with the Court below, and do not now contend, that Treasure Company was bound by the two for one agreement. The appellants seek to enforce that agreement only against the interests of Scoville and The Adamant Company, or, in the alternative, against the interest of Scoville alone. In that connection, it may be observed that both Scoville and The Adamant Company held substantial royalty interests in the well, and both were benefited by the money advanced by the appellants, which was used to complete the well. Consequently, if both are bound by the agreement, they are severally as well as

jointly liable under Civil Code, Section 1659, which reads as follows:

> "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

It may also be observed that the document on its face indicates that it was within the contemplation of the parties that only the interests of Scoville and The Adamant Company would be bound by it. The letter agreement of September 27, 1938, refers to the application to the Commissioner of Corporations. This application in turn repeats the two for one agreement, stating:

> "Applicant, Walter B. Scoville, desires to assist in completing said well, and certain of his friends and business associates are willing to advance the necessary funds, to be repaid two for one out of production." [Tr. 82-83.]

The letter agreement sets forth the persons who are required to consent to this application, stating as the second of the conditions to the use of the money which was sent down with that letter the following:

> "Second, when the said application herewith enclosed is fully executed by Walter B. Scoville, joined in and consented to by Treasure Company and J. Orville Seeple as Agent of Walter B. Scoville and The Adamant Company, and consented to by the Commissioner of Corporations of the State of California, and the said securities are transferred in escrow in favor of the undersigned, *provided that consent by Treasure Company is hereby waived in the event you are unable to get it,* and if in your judgment the well can be pushed to completion under present arrangements." (Italics added.) [Tr. 80.]

On the face of the document, therefore, it is apparent that when the other parties to the document, Walter B. Scoville and The Adamant Company, agreed to its terms, they did so with the understanding that it was conceivable that Treasure Company might not come into the deal. It should be borne in mind, also, that the well was then being operated by a committee consisting of de Bretteville, Wynn and Seeple, Wynn being an employee of Treasure Company but siding with the Adamant group in a controversy which existed between them [Tr. 218], and Seeple was the agent of the Adamant group. [Tr. 34-35.] The agreement was made in September of 1938, and the well was completed under the management of the committee. de Bretteville did not take over until after that, in December of 1938. [Tr. 192, 230.] Scoville, undoubtedly for the purpose of assuring the appellants that his people were in control, so that 15% of the gross production could physically be obtained and applied on the obligation, told them of this situation, and also had assured them that his interest was entitled to enough production so that 15% of the gross could be taken out of his share of the net, to satisfy the obligation. This is shown by the uncontradicted testimony of Mr. Bullen. At page 131 of the transcript, there is the following:

> "Q. Then will you answer the question, Mr. Bullen, as to what was said about Mr. Scoville's position in the enterprise, and what his authority was, if anything? A. He said that he was the—practically the boss of it, that he was the representative of the major interests in the well; that he, The Adamant Company, Mr. Seeple, and some other minor interests were in control; . . ."

At page 133, he testified:

> "Then, in answer to its operations, he gave me to understand that it would be operated under him by a committee of Joe Seeple, Harry Wynn and G. de Bretteville, . . ."

As to the interest of his group and Scoville's own personal interest being sufficient to take care of the appellants, Mr. Bullen testified [Tr. 144-145] as follows:

> "Q. (By Mr. Hoge): Mr. Bullen, during the conversations which you had with Mr. Scoville prior to sending your money down and making this investment, did Mr. Scoville tell you what his interest in the venture was? A. Yes, he told us his interest was approximately, as I recall it, 19 per cent; The Adamant Company, of which his daughter was an officer, 25 per cent; Joe Seeple, 6 per cent; and Harry Wynn, approximately somewhere around 6 per cent.
>
> Q. Did he say anything else in regard to those holdings of himself and his family? A. Anything else? I don't understand what you mean.
>
> Q. I mean, did he make any comment at all as to the position of those holdings, or how they would affect your interests at all? A. Oh, yes. Those holdings, they are approximately the majority holdings.
>
> Q. Just what he said now, Mr. Bullen, if anything, about that. A. He said: We are the majority holders. You are safe, you are absolutely safe. If the well comes in, you will get your royalties, plus your two for one. If it is a failure, you will get your 80 acres over in Baxter Basin, and *if there is any question, my own personal interest is sufficient to take care of you and myself.*" (Italics added.)

During cross-examination by Mr. Rice, Mr. Bullen further testified [Tr. 152-153], as follows:

> "Q. Now, you spoke a moment ago of what Mr. Scoville had represented to you as the interest in the well, and you made some reference to 80 acres in some Basin, which you said he told you you would have in the event that the Treasure Well came in dry or was a failure. A. That's right.
>
> Q. Would you explain what that reference was to the 80 acres? A. Well, that is included in our letter to Mr. Halverson, where Walter Scoville, in the event the well was a failure he would give us, I think it reads, comparable interest in 80 acres in Baxter Basin, State of Wyoming.
>
> Q. And that was acreage which he presumably owned himself, or controlled? A. Either that, or the Scoville Company, which he controlled, certainly.
>
> Q. I see. Mr. Bullen, did you then, in making this deal with Mr. Scoville, ever look to the Treasure Company personally for the repayment of this debt, or was it between you and Mr. Scoville individually? A. We looked—
>
> Mr. Allen: I will object to that as calling for a conclusion of the witness, your Honor.
>
> The Court: That is all right. Overruled. Go ahead.
>
> Q. (By Mr. Rice): You may answer, Mr. Bullen. A. We looked to the return of oil from the well on our two for one, which was to come out of 15 per cent of the first production from the well."

This testimony furnishes the background against which the subsequent letters written by Dr. Hayward, to which the Court below refers, should be considered. The Court below says:

> "This conclusion is reinforced by the contemporaneous letter written by Dr. Hayward, August

22, 1939, indicating the intention to consider the money advanced as a personal obligation of Scoville." [Tr. 95.]

Dr. Hayward wrote, under date of August 22, 1939, to de Bretteville, after appellants learned that de Bretteville had disclaimed any knowledge of the agreement, or liability of Treasure Company, for payment of the $10,000.00. The letter states in part:

> "I am enclosing herewith our instructions to Mr. Geo. Halverson agreed to by Walter B. Scovell and Walter B. Scovell Company, under date of September 27, 1938 in which Mr. Scovell agrees to pay to Herschel Bullen and the undersigned 15% of gross production from the well until the $15,000.00 is paid back two for one. We regard this as your authority if you are still operating the well to deduct from Mr. Scovell's account each month the equivalent of 15% of gross production and divide it between Mr. Bullen and myself.
>
> "This in no way makes you responsible to Mr. Scovell or the Scovell Company as it was Mr. Scovell's suggestion and guarantee that we receive 15% of gross production from the well." [Deft. Ex. A.]

This letter, it is submitted, while it shows that the parties looked to Scoville for performance of the agreement, also shows that his property interest in the well was considered to be subject to a charge for payment of the amount owed to appellants. The letter may have some bearing on the question of the liability of Treasure Company, a point not in issue here, but it clearly reinforces, rather than weakens, our contention that the parties considered the obligation to be a charge on Scoville's in-

terest, whether or not Treasure Company was willing to subject its own interest to the obligation.

The Court below refers to another letter, as follows:

> "And even the letter from the attorney Charles Franklin Johnson, dated September 26, 1938, speaks of it as a 'contingency', to avoid usury." [Tr. 95.]

This letter is from an attorney, Charles Franklin Johnson, to Mr. Bullen, replying to his question as to whether or not the transaction might be considered usurious under the law of California. [Tr. 137-138.] The letter is Plaintiffs in Intervention's Exhibit B-5. The relevant portion is as follows:

> "As I understand your transaction with Mr. Scoville, he is obtaining certain money from you to be used in completing the well, for which he will cause to be transferred to you from him certain royalty interests now in escrow in his name. As a part of the transaction, it is to be agreed that the investment made by you will be returned two for one out of production. Where a person advances money and the repayment of the advance or of any profit or interest thereon depends upon a contingency, the transaction does not fall within the usury law. If I correctly understand this transaction, there will be no promissory note or other agreement to repay your money other than out of production from this property."

This letter, we submit, negates, rather than supports, the idea of personal liability. There was to be no promissory note or other agreement to repay the money other than "out of production."

The last letter to which the Court refers is Mr. Bullen's letter to Halverson dated September 27, 1938, the

letter agreement itself upon which we rely, and we are inclined to agree with the Court's statement about this letter:

> "In Bullen's letter to their attorney, Halverson, dated September 27, 1938, which is the basis of the claim, any personal liability which might go with ownership of production is rejected." [Tr. 95.]

This statement on the part of the learned trial court must have been inadvertent, because its conclusion was that the obligation was personal. Nevertheless, as we interpret it, we think that it is a correct statement. When Scoville and The Adamant Company signed the endorsement on the letter, "We agree to the foregoing," what they agreed to was that the money would come out of production from Treasure Well No. 8, and Scoville agreed that, if there was no production from that well, he would substitute other property in Wyoming. There is nothing in the letter to indicate that Scoville or anyone else would pay the money personally if neither property was productive. On the contrary, it is clear that there was no such obligation.

The situation would seem to be analogous to that in which security is given for payment of a sum of money, with a provision that there shall be no deficiency in the event the security is insufficient. It may be, as Dr. Hayward thought, that Scoville guaranteed that 15% of the gross production would be applied to payment of the obligation. When the agreement is viewed in the light of Scoville's representations, this would appear to be a reasonable interpretation. For the purposes of this case, however, it would seem to be sufficient that Scoville and The Adamant Company, if it is bound by the agreement,

a point which will be discussed later, consented that their property, to wit, their share of production from the well, would be subject to the obligation. That as holders of participating royalty interests they did have a property interest is, of course, established under the law of California, as shown above, and as this Court mentioned in its opinion in the condemnation case, *United States v. Adamant Co.,* 197 F. 2d 1, at p. 5, though the Court held, also, that they were not such interests as could be recognized and paid for as such in a condemnation proceeding, 197 F. 2d 1, at p. 12.

Under the agreement which The Adamant Company and Scoville had with Treasure Company, The Adamant Company had a 25% participating royalty interest, and Scoville a 19% participating royalty interest. [Tr. 31.] At the time of the condemnation, The Adamant Company still had a 25% interest, and Scoville had a 16% interest. *United States v. Adamant Co.,* 197 F. 2d 1, at p. 4, and the cash now held by the Court, in lieu of such interests, is $47,925.00 for The Adamant Company, and $30,672.00 for Scoville. [Finding VIII, Tr. 104.] Both Scoville and The Adamant Company, necessarily benefited, therefore, by the money which the appellants advanced, and which was used for completion of the well. Therefore, the obligations of Scoville and The Adamant Company under the agreement, whatever else they may be, are several as well as joint, by reason of Section 1659 of the Civil Code of California. It follows, that, if the shares of both are liable, or if only the share of Scoville is liable, the full amount of $10,000.00 should be collected out of such shares, or share, except that there should be deducted from the $10,000.00 a part to be apportioned to

the participating royalties held by the appellants, since, as Mr. Bullen recognized, their own share of the participating royalty, an aggregate of 2%, was likewise subject to the charge of 15% of gross production to be used to repay the $10,000.00. [Tr. 146.] The conclusion that the full amount should come out of the shares of the parties to it, Bullen, Hayward, Scoville and Adamant, is strengthened by the fact, as noted above, that the agreement itself contemplated the possibility that Treasure Company might not sign, and that only Walter B. Scoville, Walter B. Scoville Company and The Adamant Company were required to sign.

To summarize the matter, it is submitted that, from the face of the agreement, as well as from the circumstances under which it was given, and the conversations of the parties, if and to the extent admissible for the purpose, and also the later letters, and testimony, if and to the extent admissible, the intention is clear that the only personal liability contemplated was a covenant on the part of those signing the agreement that 15% of gross production would be applied to payment of the obligation, and that the intention was, also, quite clear, we submit, that the share of production owned by any and all of those who joined in the agreement, including the shares of the appellants, would stand as security for payment of the $10,000.00, and this is the legal effect of the agreement.

II.

The Decision by This Court in the Condemnation Case Does Not Preclude a Decision on the Merits in the Case at Bar of the Rights of the Appellants to Enforce the Two for One Agreement Against the Royalty Interests of Scoville and the Adamant Company.

It is not clear whether or not the trial court considered that the decision of Judge Westover and of this Court in the condemnation case precluded any holding that the letter agreement of September 27, 1938, created a lien upon or an assignment as security of the interests of the royalty holders, Scoville and The Adamant Company, as distinguished from the interest of the lessee, Treasure Company. At the conclusion of the oral argument the Court was apparently of the view that the agreement had the effect of an assignment, but that Judge Westover's decision determined the matter. The Court said:

> "I may say that I am inclined to think that as we are dealing with persons who had no interest,—who were solicited, and not persons who were a part of the venture, that it may well be that the language recited by Mr. Scoville in the letter is broad enough to make an assignment or is broad enough to constitute, in reality, an assignment so that the statute of limitations would not begin to run until the fund came into existence.
>
> "However, I am of the view, and I don't want any argument on that point, that so far as Bullen and Hayward are concerned, first, that the finding of Judge Westover is determinative of the matter, and, second, that if it is not, the facts in the case or the admissions contained in the letters by Dr. Hayward and others indicate that he was looking to Scoville,

> and not to the Treasure Company. In other words, that the Treasure Company is not bound by the two for one agreement." [Tr. 237-238.]

We agree with the last sentence, of course, and contend that the condemnation case decided only that the two for one agreement created no lien in favor of the appellants on Treasure Company's interest. The above quoted statement seems to possibly indicate an inclination of the Court toward our view. However, in its final opinion, upon which the findings are based, the Court below, while it does not expressly rely on the language of this Court in the condemnation case, does return to the interpretation which that language suggests, that is to say, that the obligations under the two for one agreement were personal only.

In any event, the effect of the condemnation case is, of course, involved in this appeal, and we contend that the question now submitted for decision, that is to say, whether there exists a lien or charge upon the interests of the royalty holders in favor of the appellants under the two for one agreement, is not *res judicata,* for the reason that the judgment is not final as to the share of the award going to the royalty holders, their money being still held for disposition by the decision in this action, and for the further reason that the Court held in that case that the rights of the royalty holders, and necessarily, therefore, the rights of claimants against their royalty shares, could not be determined in that action. We further contend that the law of the case is not applicable for two reasons, to wit, that this is a different case, and that it would be unjust to apply that doctrine.

A judgment to be *res judicata* must, of course, be final. While the judgment in the condemnation case is final in the sense that no appeal can be taken from it, the judgment itself delegated to another Court the right and duty to determine the final amounts payable to the royalty holders, and the money which the Court found "other things being equal" (*United States v. Adamant Co.,* 197 F. 2d 1, at p. 13), would go to them, is now held in the registry of the Court. What they finally get will be decided in this action. As the Court said, "They may be entitled to more or less." (*United States v. Adamant Co.,* 197 F. 2d 1, at p. 12.)

The Federal Court sitting in a condemnation action is a Court of limited jurisdiction. It can exercise only the powers conferred upon it by the statute. The Court, with the aid of a jury, values the property which has been taken by the Government. Estates in and liens against the property are transferred to the fund thus awarded in payment. In the case involved here, the royalty holders did ask for adjudication of their rights, and for payment out of the fund. This Court, however, sustained only a limited adjudication of such rights, that is to say, an adjudication necessary to determine the rights of an assignee of the lessee's interest under the leasehold.

The lessee, Treasure Company, had assigned its interest to Reconstruction Finance Corporation. The assignment was subject to outstanding royalties, which, as the Court recognized, are property interests of a sort under California law. The assignee would take, therefore, only the interest in the award belonging to the lessee after deducting the share which would have to be reserved for its

royalty holders. The aggregate amount of the outstanding royalties thus had to be adjudicated, and, in order to find the aggregate amount, the individual percentages also had to be determined. This the trial court did, its holding thereon was affirmed by this Court, and the lessee's share was ordered to be paid over to its assignee. As to the remainder of the fund, however, that is to say, the share which was reserved for the royalty holders, the Court ordered that this amount be held by the Court pending the outcome of accounting suits between the royalty holders and the lessee, theretofore instituted and still pending, of which the case at bar is one.

This was on the theory that the holders of royalties issued by a lessee under an oil and gas lease entitling them to a share of the net proceeds of sale of the oil and gas produced from the well, are like stockholders in a corporation, and, of course, stockholders would have no right to come into Court and claim any share of a fund awarded as a result of condemnation of the corporation's property. It would be equally true that any person claiming a lien upon the shares of stock of a particular stockholder would have no place in such a suit, and his rights to such a lien could not be adjudicated therein.

So far as the claim of a lien upon the lessee's interest is concerned, the situation is different. In the condemnation case the appellants here did assert that the two for one agreement created a lien upon the interest of the lessee, Treasure Company. The appellants, in their capacity as royalty holders, and the other royalty holders, also claimed a lien against the leasehold for amounts claimed to be due to them from past production. The

Court held against both contentions. The money representing the lessee's interest was ordered paid over to its assignee, Reconstruction Finance Corporation, free and clear of any lien of the appellants under the two for one agreement, and free from any lien of the participating royalty holders for past production. The Court had, and exercised, jurisdiction to determine all encumbrances against the leasehold, and so these questions are *rei judicata.*

It may be that the Court, in its discussion of the two for one agreement, did not intend to go any further, and that it had in mind only the effect of the agreement, if any, upon the lessee's estate. The language is broad, but there is no specific discussion of the rights of these appellants as against Scoville. If it can be interpreted as going any further than a holding that the lessee's estate was not bound, the statements cannot be given effect, because of the Court's own ruling as to its limited jurisdiction. In 2 *Freeman on Judgments* 1546, Section 743, the author states:

> "There can be no doubt that the dismissal of an action or denial of relief for want of jurisdiction is not a judgment on the merits, and cannot prevent the plaintiff from subsequently prosecuting his action in any court authorized to entertain and determine it. No question other than the jurisdictional one is concluded by such judgment, since after a court has determined its lack of jurisdiction, any further finding or judgment as to the matters alleged is wholly ineffective."

In the condemnation case, this Court, while recognizing, as noted above, that royalty holders, under California law, have a property interest of a sort, points out

that under California law such interests are securities, 197 F. 2d at 6, and it treats the participating royalty holders for the purposes of the condemnation case as if they were stockholders of a corporation, saying at page 12:

> "So a court can no more divide the proceeds of a sale of a leasehold interest among the lessee's participating royalty holders, than it could divide the proceeds among the stockholders of a corporation prior to dissolution."

Again, the Court, at the same page, in referring to the royalty holders and the possible outcome of the accounting actions, said:

> "They may be entitled to more or to less. But until those actions are actually determined no court can order the payment of these awards without inviting further litigation."

These statements of the Court, together with its ruling that the percentages of the award which, other things being equal, would go to the royalty holders, should be withheld until further adjudication of their rights, would seem to bring the case squarely within the rule as stated above by Mr. Freeman.

A case which is a good illustration of the rule is *City of Pocatello v. Murray,* 21 Idaho 180, 120 Pac. 812 (1912). This was an action by the City of Pocatello against the defendant Murray, who owned and operated the water system which supplied the city with water. The complaint sought a writ of mandate to compel the defendant to appoint commissioners to act with others pursuant to a recently enacted state law, for the purpose of fixing the rates charged by the defendant for water. The defendant set up two defenses; first, that the existing

rates were established by a contract between him and the city, as embodied in an ordinance adopted by the city long before the enactment of the state law, and that to enforce the state law would impair his contract, and deprive him of property without due process of law; and, second, he pleaded that the matter was *res judicata,* the first defense having been decided in his favor in another case.

It did appear that the city had filed a suit in equity against the defendant in the Circuit Court of the United States, asking that Court to fix reasonable rates under the state statute in question, and that the Court had sustained a demurrer to the bill on two grounds, one of these being that the state statute was unconstitutional, and the other being that it would not be proper for the Court to fix water rates, which the Court said was a matter for legislative or administrative action rather than a judicial function. (*City of Pocatello v. Murray,* 173 Fed. 382.)

The Supreme Court of Idaho held that the statute was not unconstitutional, because the water rights, under the state constitution, were held in trust for the people, and subject to control by the legislature, so that the city had no power to make a contract which would prevent future legislative action; and it ruled against the defendant on the *res judicata* point, saying at page 816 of the Pacific report:

> "As we understand it, where a case is disposed of on the ground that the court has no jurisdiction to hear and determine the matter, it has no jurisdiction to pass upon any question except the jurisdictional question."

This decision of the Supreme Court of Idaho was affirmed by the Supreme Court of the United States. (*Murray v. Pocatello,* 226 U. S. 318, 57 L. Ed. 239.) The Court held that it would not interfere with the decision of the Supreme Court of Idaho interpreting the state constitution, and that the matter was not *res judicata.* In its discussion of the latter point, the Court said at page 324 of 226 U. S., and at page 242 of 57 L. Ed.:

> "Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were. The two grounds are not on the same plane, as they were in *Ontario Land Co. v. Wilfong* (citations), and when jurisdiction to grant equitable relief was denied, the ground of the merits could not be reached."

Another case which illustrates the principle is *Robertson v. Gordon,* 226 U. S. 311, 57 L. Ed. 236 (1912).

This was an action by an attorney against another attorney seeking to enforce a contract for division of fees and repayment of expenses, and to impress with a lien a sum which had been awarded by the Court of Claims as attorney's fees in the case out of which the agreements arose. The agreement to repay expenses provided that such expenses would be repaid *"out of* my share of the profit." (Italics added.)

The Court of Claims had not only determined the total attorney's fees, but the division to be made thereof, and had ruled against the attorney who was the plaintiff in this action.

The Supreme Court held that the plaintiff was entitled to recover, and that the ruling of the Court of Claims

did not make the matter *res judicata,* because that Court had jurisdiction only to determine the aggregate amount due to all the attorneys.

It follows, we submit, that if and to the extent that a discussion by this Court of the two for one agreement was intended as a ruling on the question of whether or not it created a lien upon the interests of the royalty holders who were parties to it, as distinguished from the interest of the lessee, it cannot be given such effect, because of the express holding of the Court that the rights of the royalty holders would have to be decided in another action; and because their rights have still not been finally decided, but will be in the case at bar. *A fortiori,* the rights of claimants asserting a lien against the royalties of those parties could not have been decided, and will have to be decided in this case.

For the same reasons that the case is not *res judicata,* the remarks of the Court, if they are to be interpreted as dealing with the right of the appellants to reach the royalty interest of Scoville or Adamant under the two for one agreement, should not be considered binding upon the Court in the case at bar, under the doctrine of "the law of the case." This rule applies only to a retrial of the same case. (*Fidelity & Deposit Co. v. Port of Seattle,* 106 F. 2d 777 (C. C. A. 9, 1939.) This was an action on a surety's bond commenced in the State Court and removed to the Federal Court. There had been a prior action on the same bond by the same parties brought in the State Court and dismissed for failure to comply with the Court's order requiring different causes of action to

be separately stated. On the point under discussion, this Court said at page 781 of the report in 106 F. 2d:

> "It is also evident that the proceedings in the state court action do not in any way provide a 'rule of the case' to be followed in the present action, because that doctrine is confined in its operation to subsequent proceedings in the *same* case." (Italics by the Court.)

Judge Hall said in his memorandum permitting the appellants to intervene:

> "While the Circuit Court affirmed the holding of the trial court that 'the enforcement of the so-called "two for one" agreement between the Bullens and the Haywards and Walter B. Scoville is a personal matter and is not a matter for settlement in the within case', it is to be noted that the holding was confined to the 'within case', viz.: the condemnation case. I do not regard such a holding as precluding the Bullens and the Haywards from intervening in this case which is certainly an entirely different case than the condemnation case." [Tr. 65.]

Furthermore, the doctrine of the law of the case is not applied where it would be unjust to do so. In *England v. Hospital of the Good Samaritan*, 14 Cal. 2d 791, at 795, 97 P. 2d 813, at 814, the Court said:

> "The doctrine of the law of the case is recognized as a harsh one (2 Cal. Jur. 947) and the modern view is that it should not be adhered to when the application of it results in a manifestly unjust decision. United Dredging Co. v. Industrial Acc. Comm., 208 Cal. 705, 284 P. 922. However, it is generally followed in this state. But a court is not absolutely precluded by the law of the case from reconsidering questions decided upon a former ap-

peal. Procedure and not jurisdiction is involved. Where there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before. Messinger v. Anderson, 225 U. S. 436, 32 S. Ct. 739, 56 L. Ed. 1152; Seagraves v. Wallace, 5 Cir., 69 F. 2d 163; McGovern v. Eckhart, 200 Wis. 64, 227 N. W. 300, 67 A. L. R. 1381."

It would, we submit, be unjust to apply the doctrine in this case, because it would mean that the people who gambled in supplying money for a wildcat oil well, which was successfully completed, would be deprived of the bargain voluntarily offered to them; and also because the opinion upon which such a ruling would be based contains, we respectfully submit, a number of errors in its application to the problem here presented.

The opinion places reliance upon *Helvering v. O'Donnell,* 303 U. S. 370 (1938), a case which held that the holder of an agreement entitling him to a percentage of the net profits from the operation of oil properties was not entitled to the 27½% depletion allowance which is permitted to be deducted from income from oil properties under the Federal income tax law. The opinion of the Supreme Court does not discuss the question of whether the holder of the agreement would have the right to specific performance under California law, and that would be an immaterial question in a tax case, but in the case at bar, where the jurisdiction of the Federal Court depends only on diversity of citizenship, California law is controlling. (*Erie Railroad v. Tompkins,* 304 U. S.

64, 82 L. Ed. 1188.) Federal tax law must, of course, be uniform. As the Court said in *Burnet v. Harmel,* 287 U. S. 103, at 110:

> "Here we are concerned with the meaning and application of a statute enacted by Congress in the exercise of its plenary power under the Constitution to tax income. The exercise of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language expressing a different purpose, is to be interpreted so as to give a uniform interpretation to a national scheme of taxation."

In *Commissioner of Internal Revenue v. Southwest Exploration Co.,* 220 F. 2d 58, this Court affirmed the decision of the Tax Court, which had held, in an opinion citing *Helvering v. O'Donnell,* that a company which had furnished drill sites for offshore drilling operations in California, in consideration of which it was to receive a percentage of the net profits from the wells, was not entitled to the depletion allowance. This was reversed by the Supreme Court in *Commissioner of Internal Revenue v. Southwest Exploration Co.,* 16 U. S. S. Ct. Bulletin (C. C. H.) 417, decided February 27, 1956. It would seem from this that *Helvering v. O'Donnell* is no longer good law even in the tax field, though it was not expressly overruled. But the significant point is that neither the Tax Court nor this Court, nor the Supreme Court of the United States, in deciding the depletion cases, cited any California case. By the same token, we submit that a Federal tax case should have no bearing on the problem now before this Court.

It may be noted, also, that the *O'Donnell* case interprets an agreement dealing with a share of net profits, whereas the two for one agreement relates to gross production. The *O'Donnell* case apparently turned on the point that O'Donnell had only an interest in net profits, which might not materialize, even though there was production. The case would seem to be in point only for the proposition that such an interest is too evanescent to be recognized as a property interest, compensable as such, in a Federal condemnation case and that the rights of persons claiming a lien against it cannot be considered either in such a case.

At page 9 of the opinion in 197 F. 2d 1, the Court refers to a previous State Court decision, being one of the first actions between Scoville and de Bretteville, in which it had been held that Scoville's group lost the right of management because the well when completed was good for not more than 200 barrels per day. The Court said:

> "The judgment in the State Court determined that Adamant, Scoville and Wynn, 'had no right of management in the undertaking' (Scoville v. de Bretteville, 1942, 50 Cal. App. (2) 622, 632, 123 Pac. 2d 616, 621). This adjudication fixed the measure of their rights as they existed at the time the letter to the Bullens and Haywards was written."

The last sentence of this is a mistake. The well was completed under the direct management of Seeple, who was the agent of the Scoville-Adamant group, on the executive committee. It was completed in December of 1938 [Tr. 191 and 230], and, of course, it was not until after completion that the amount of production was determined,

as a result of which the Scoville-Adamant group lost the right of possession and management whereas the money of the appellants had been sent down to Los Angeles with their letter of September 27, 1938 [Tr. 79 and 134], and that money was used in the completion of the well. [Tr. 106.]

In the last paragraph of the footnote at page 9 of the opinion, the Court apparently refers to the difference between agreements and assignments, and cites two cases to the effect that the holders of warrants for stock are not considered stockholders. This, of course, is true, but the warrants involved in those cases were merely options to buy stock, whereas in our case there was an agreement which had been executed by the appellants furnishing the consideration. The fact that it is in form an agreement is immaterial, *Dougherty v. California Kettleman Oil Royalties, supra.* Even if it started as an option, it would, after exercise, give a vested interest under California law. (*Gavina v. Smith, supra.*)

The Court, at page 9, distinguishes two Oklahoma cases, one of which, *Phillips Petroleum v. Gable,* 128 F. 2d 943 (C. C. A. 10, 1942), is on all fours with the case at bar. The distinction is made by the Court on the ground that the Oklahoma cases depended upon a statute which expresses the doctrine of potential possession. Here, as noted above, the Court overlooked the fact, as did counsel also, and it was not called to the Court's attention, that the California statute, Civil Code,

Section 2883, is the same as that of Oklahoma, *in haec verba.*

Finally, it may be noted that there were a great many issues in the condemnation case, and this fact is one of the elements which may be considered in deciding the effect of it. As stated in Bigelow on Estoppel (6th Ed.), Section 179, note:

> "The reason why there is no estoppel concerning matters not necessarily involved in the decision of a case is that, from the very fact that they were not of the essence of the action, they would not require, and in all probability did not receive, that searching examination and scrutiny that would be given to a matter in issue the decision of which would determine the case."

The issue of whether or not the two for one agreement was secured by an assignment in the nature of a trust deed or a lien upon the royalty interests of Scoville and/or The Adamant Company, as distinguished from the lessee's interest, was not, as pointed out above, properly involved in the condemnation case, because it was held that such royalties were not compensable in a Federal condemnation case, from which it follows that the claims of creditors to a lien upon or other security interest in such royalties could not be adjudicated by the Court in that matter.

III.

The Complaint in Intervention Seeking to Enforce the Security of the Two for One Agreement Against the Royalty Interests of the Parties Thereto Is Not Barred by the Statute of Limitations.

The question of whether the complaint in intervention is barred by the statute of limitations depends upon the substantive analysis of the two for one agreement. If it creates a security interest in the royalties of the obligors, it is not barred. If it is a mere personal covenant, it is barred by the four year statute. This is simply a question, as we see it, of whether the agreement means that the money was to be paid "out of" production, or, as the trial court held, "when" production was obtained, and the point has been fully discussed.

There are two approaches to the statute of limitations question, depending upon whether the security interest, which we will assume for this purpose was created by the agreement, is treated as being in the nature of a trust deed, or whether it is a lien, but both approaches give the same result.

In *Recovery Oil Co. v. Van Acker,* the statute of limitations point was decided on the second appeal, 96 Cal. App. 2d 909, 216 P. 2d 483. There the respondent held an assignment entitling her to 15% of the gross production of certain oil property until she had received $10,000.00. In our case, the appellants hold an agreement which entitles them to the same thing, the only difference being that in one case words of present assignment are used, and in the other, words of agreement. This is immaterial as heretofore noted under the California

law relating to oil rights, an agreement which has been executed, by the promisees' furnishing the consideration for it, creates a present legal interest. (*Gavina v. Smith, supra.*) The Court, in the *Van Acker* case, held that, notwithstanding the fact that more than four years before the action was filed the property had produced sufficient amounts so that the respondent could have been paid from production, her rights were not barred by the statute, the Court saying at page 912 of the report in 96 Cal. App. 2d, and at page 485 of the report in 216 P. 2d:

> "Any obligation to pay was not only a continuing one but she had an interest in the land which did not terminate until she actually received that amount of money. Her interest was vested as an estate, and not as a lien. Her position was similar to that of the holder of a trust deed."

Under California law an action by the beneficiary to compel performance of the trust, *e. g.,* an action against the trustee to compel a sale, is not barred by the statute, though an action on the debt may be. (*Sacramento Bank v. Murphy,* 158 Cal. 390, 115 Pac. 232.) The *Van Acker* case apparently holds that an assignee for security of oil rights is both the trustee and the beneficiary. In our case, the property was taken from the trustee-beneficiary when the Government condemned the fee, and it would seem that the complaint in intervention could be regarded as an action to recover the trust property.

Whether this is true or not, and whether or not the action is considered to be one to foreclose, and even if the security is considered to be only a lien, it is not barred by the statute. (*Rose v. Conlin,* 52 Cal. App. 225, 198

Pac. 653 (hear. den. by S. Ct., Jan. 9, 1921).) This case involved the foreclosure of a mortgage, which, under the California law is, of course, only a lien. Part of the property securing the mortgage was condemned, and it was held that an action by the mortgagee to apply the condemnation award to satisfaction of the unpaid balance on his mortgage was not barred, because the statute of limitations did not begin to run until the judgment making the award became final, at which time the substituted *res* became available. This case was relied upon by Judge Peirson M. Hall in holding that the statute of limitations did not apply, when he granted the motion for leave to intervene. His discussion is as follows:

> "*Rose v. Conlin*, 52 Cal. App. 225, is authority for the proposition that the cause of action in that case arose when there was a *res* to which the remedy sought could be applied; and also as authority for the proposition that the claimant in that case *could* have intervened in the suit which resulted in a money judgment constituting the *res*. In that case a controversy arose concerning foreclosure of mortgages and a taking by the Southern Pacific Railroad which the court finally held was a condemnation and gave a money judgment. The holder of a deficiency on a mortgage foreclosure did not intervene in the litigation which resulted in the condemnation judgment, but chose rather to sue after the award for the condemnation was made. The court held that the statute did not begin to run until the award was made and the judgment for money, *i. e.*, the *res* came into being.
>
> "Applying the doctrines of that case to the instant one it appears that the 'two for one' agreement called for the payment of money out of production of an

> oil well. But before the oil well could produce sufficient money to satisfy the agreement the government condemned and took the property. On a jury trial an award was made for the taking, which included the value of future production; and Scoville's interest in future production was not determined until the time that judgment became final. The judgment may well have been in the condemnation suit that the future production of the well had no value. The statute began to run, not from the date that the government took the property in 1942, but rather began to run at the time the awards were made final, which was not until the mandate from the Circuit Court in July, 1952. It was not until the mandate came down that Scoville's interest in the award was fixed as the sum of $30,672. That money is on deposit in this court. Under the opinion of the Circuit Court this money cannot be distributed until the within accounting action is determined. It follows that the statute of limitations has not run and that the proposed complaint in intervention is timely."

If it be considered, contrary to the *Van Acker* holding, that the statute began to run after production was obtained, and the stipulated percentage not paid over, it may be observed that the well was not completed until the middle of December of 1938, and the property was condemned less than four years after that, to wit, on September 28, 1942, so that the statute had not run, even as to the earliest production, when it was interrupted by the condemnation.

It follows, we submit, that if the Court finds that the two for one agreement did create a security interest in the share of production owned by the participating royalty

holders who were parties to it, whatever the nature of that security, whether it be analyzed as a trust deed or a lien, the enforcement of it by means of the complaint in intervention in this case is not barred by the statute of limitations.

IV.

In Addition to Walter B. Scoville, The Adamant Company Is Also a Party to the Two for One Agreement, and Is Bound by It.

It is not clear from the opinion of the trial court in this case, or from the findings of the Court, whether or not it was the Court's view that The Adamant Company executed the two for one agreement. In its opinion, the Court first says:

> ". . . that the plaintiffs in intervention had only a personal claim against Scoville for double the amount of the $5,000.00, and that the agreement to pay that amount was merely an agreement to pay when the returns from the first 15% of production came in." [Tr. 95.]

But later on in the opinion the Court says:

> "The final determination announced that the undertakings towards the Bullens and Haywards by Scoville *and the Adamant Company* were personal obligations which are barred by the statute, is, of course, mine." [Tr. 96.] (Italics added.)

In Finding IX, the Court found:

> "On or about the 27th day of September, 1938, plaintiffs-in-intervention Herschel Bullen and J. C. Hayward entered into a certain contract in writing with defendant-in-intervention Walter Scoville where-

> by said plaintiffs-in-intervention agreed to advance the sum of $5,000.00 for the purpose of completing and bringing into production said Treasure Well No. 8." [Tr. 105.]

In Finding XI, reference is also made to the letter of September 27, 1938:

> ". . . the terms of which were agreed to in writing by defendant-in-intervention Walter B. Scoville,"

and yet further on in the same finding appears the following:

> "A true copy of said letter, and of the agreement endorsed thereon by defendants-in-intervention Walter B. Scoville *and The Adamant Company,* is attached to the complaint-in-intervention herein and marked Exhibit A, . . ." [Tr. 106.] (Italics added.)

In view of the Court's holding that the agreement did not create a security interest in production owned by the obligors thereunder, and that it was, therefore, barred by the statute of limitations, the question was immaterial from the Court's viewpoint. If the Court erred in this holding, the point becomes material, and the appellants have assigned as error the Court's finding, if it did so find, that the agreement was made only by Walter B. Scoville. [Tr. 115-116.]

In the condemnation case, Judge Westover found that the agreement had not been executed by The Adamant Company, and was not binding upon it, and there is a *res judicata* question as to this. However, in view of the facts, hereinabove pointed out, that the judgment in that case did not dispose of the royalty holders' shares of production, and so was not a final determination of their

rights, or of creditors' claims against their shares, and the Court having declined to take jurisdiction of the rights and obligations of the royalty holders, except as necessary to determine the remaining share of production owned by the lessee after making the royalty assignments, it is submitted that this finding in the condemnation case, being one which has no bearing on the lessee's rights, is not *res judicata*. As the Court said in *Guardianship of Leach,* 30 Cal. 2d 297 at 311, 182 P. 2d 529 at 536:

> ". . . it is well settled that the findings and conclusions of the court do not have the force and effect of an adjudication *where the subject matter is not disposed of by the judgment.* The force of an adjudication rests in the judgment itself, *and findings not necessary to the judgment are in no wise conclusive.*" (Italics added.)

It is believed that the evidence shows that the agreement was executed by The Adamant Company, both by an officer, Helen Scoville, and by its agent for the particular transaction, J. Orville Seeple, and that it was binding upon it for that reason, and also because it received the benefits of the bargain.

The original of the letter agreement of September 27, 1938, has been lost, and was not available either for the condemnation case or this case. Mr. George Halverson, the Los Angeles attorney to whom the plaintiffs in intervention sent the letter of September 27, 1938, testified in the condemnation case, and his testimony was used in this case, that he handled the transaction by having the terms of the letter agreement agreed to by The Adamant Company, The Walter B. Scoville Company, and Walter B.

Scoville. [Tr. 172.] He further testified to the effect that he relied upon Walter B. Scoville to obtain the signature of The Adamant Company. The testimony on the latter point is as follows:

"Q. Will you state whether or not you can testify that the signature of The Adamant Company, by Helen Scoville, secretary, was on the original of that? A. I can.

Q. What is your answer to that? Was it or was it not? A. It was on it.

Mr. Hoge: That is all.

The Witness: Of course, I didn't see her write it, but I know it was there.

Q. (By Mr. Hoge): You saw the signature? A. It was produced by Mr. Walter B. Scoville.

Q. Do you know Mrs. Scoville's signature? A. I don't think I know Mrs. Scoville. I know her father very well, but I don't think I know Mrs. Scoville.

Q. Do you know her signature? A. I wouldn't say that I do.

Q. You say it was produced by Walter B. Scoville and The Adamant Company. What did he tell you about it, if anything? A. He just told me that was, I am sure, that it was the signature of The Adamant Company, by his wife, Helen Scoville.

Q. Did he say anything to you in that connection? A. I can't remember that far back.

Mr. Bodkin: It was stipulated yesterday that that was her signature, and she was authorized to bind the company, according to my recollection.

Q. Mr. Halverson, may I ask you, referring again to this letter—this is a question by Mr. Hoge again—Petitioners' Exhibit 9 from Messrs. Young

& Bullen, I ask you to read that paragraph. A. Yes, sir.

Q. Can you state that you had in your possession the original of that document, signed and executed by The Adamant Company? A. It was on the letter from Herschel Bullen and Dr. Hayward, on the bottom of the letter. Yes, I had the original letter in my possession for many years, I know that.

Q. And did it have what purported to be the signature of The Adamant Company, by Helen Scoville, upon it? A. It did, yes, sir." [Tr. 173-174.]

In the case at bar, the deposition of Walter Scoville was taken, and he testified as follows:

"Q. I understand, Mr. Scoville, a copy of that letter-agreement which has been referred to is on file having been attached as Bullen and Hayward in intervention in this matter. A. I understand so but I don't know. I have no way of telling.

Here, again, your Honor, he is talking about Exhibit B-1, the letter of September 27, 1938.

The Court: All right.

Mr. Hoge (Continuing reading):

Q. When you said you okehed it, did you actually subscribe your name to it? A. Yes, right on the letter.

Q. Did the Adamant Company also okeh that letter? A. Yes, indeed. We okehed the terms and conditions under which those monies should be turned over.

Q. Can you recall who signed for the Adamant Company at that time? A. No, I cannot.

Q. I believe the document shows Helen Scoville signed for the Adamant Company. Was she an officer at that time? A. She was.

Q. Were you an officer? A. No, I have never been.

Q. Who were the stockholders at that time? A. All of my children. It was formed in 1935 as an organization of the family.

Q. Who is Helen Scoville? A. That is one of my daughters.

Q. Were you present when she signed? A. I do not know.

Q. You do know the Adamant Company agreed to it? A. She had authority." [Tr. 182-183.]

In addition to the foregoing, J. Orville Seeple was the agent of The Adamant Company for the purposes of the drilling and management of the well, being appointed as such by the original agreement between Treasure Company, Scoville and The Adamant Company [Tr. 34], and it appears from his testimony in this case that he was acting with Scoville in raising money to complete the well, and specifically in the transaction with appellants. He testified:

". . . we raised part of the money from Mr. Bullen and Dr. Hayward, and some others, and we completed the well." [Tr. 188.]

On cross-examination by Mr. Rice, he testified as follows:

"Q. Mr. Seeple, did you ever undertake to act for Mr. Scoville or for The Adamant Company in this activity of finding the funds to refinance this,—I mean to complete the well? A. Yes." [Tr. 196.]

He also acted in the disbursement of the money. Mr. de Bretteville testified as follows:

"The Court: That money—this money that they derived from these side agreements, we might call

them, was that turned over and was that in the name of Treasure Company or of this group by a trustee?

The Witness: No, it was put into a trust fund that was called the Treasure Company Trust Fund No. 1.

The Court: And that is the money from Mr. Bullen and Dr. Hayward.

The Witness: Yes, sir.

The Court: That money, so far as you were concerned, came to you or to Treasure through Scoville?

The Witness: Yes, it was put into a trust fund that Mr. Seeple and I signed the checks on." [Tr. 229-230.]

The Court found that:

"Pursuant to said agreement plaintiffs-in-intervention advanced the sum of $5,000.00, and said money was used as part of the funds by which said oil well, Treasure Well No. 8, was placed on production. . . ." [Finding XII, Tr. 106.]

The two for one agreement is contained not only in the letter agreement of September 27, 1938, but also in the application to the Commissioner of Corporations, as hereinabove noted, which refers to the necessary funds "to be repaid two for one out of production." [Tr. 83.] Among other signatures to this application was the following:

"J. Orville Seeple, as agent of Walter B. Scoville and The Adamant Company, does hereby join in and consent to the foregoing Application and the transfer therein referred to.

The Adamant Company,
By Helen Scoville, Secretary
J. Orville Seeple." [Tr. 84.]

It is submitted, therefore, that the testimony established that the two for one agreement, as embodied in two documents, was signed by the authorized representative of The Adamant Company, the letter agreement being signed by Helen Scoville, who, according to the testimony of Walter B. Scoville, her father, was an officer and had authority to sign, and the other document, the application being signed by J. Orville Seeple, a duly appointed agent of The Adamant Company, who acted for it in this transaction. The Adamant Company benefited from the transaction, by which appellants' money was used to complete the well, that company having a 25% royalty interest, and it is not in a position to raise any question of lack of formal authorization.

If, as we believe, The Adamant Company is bound by the agreement, the total production subject to the lien is as follows:

The Adamant Company	25% or	$47,925.00
Walter B. Scoville	16% or	30,672.00
Herschel Bullen and Mary H. Bullen	1% or	1,917.00
J. C. Hayward and Marian S. Hayward	1% or	1,917.00
	Total	$82,431.00

Deducting the portion which should be charged against the interests of the appellants, being $\frac{3,834}{82,431}$ of $10,000.00, or $465.11, the remaining $9,534.89 should be charged proportionately to the shares of Walter B. Scoville and The Adamant Company, these proportions being $\frac{47,925}{82,431}$

of $10,000.00, or $5,826.08, to The Adamant Company, 30,672 and 82,431 of $10,000, or $3,708.81, to the share of Walter B. Scoville. The total charges would thus be as follows:

To the appellants	$ 465.11
To The Adamant Company	5,826.08
To Walter B. Scoville	3,708.81
Total	$10,000.00

If The Adamant Company is not bound by the agreement it would seem clear that Scoville's interest is subject to a charge for the full $10,000.00, less an amount apportionable to the 2% interest of the appellants. Scoville's attorney, Halverson, who was also acting as the attorney for the appellants in this matter, left it to Scoville to obtain the execution of the agreement by his family company, The Adamant Company, and there is no question but that Scoville, in effect, represented to Mr. Halverson that he had obtained its execution. Furthermore, the appellants had dealt with Scoville alone in the transaction, they looked to him for performance, and he represented to them that his personal interest alone would be sufficient to pay them. [Tr. 145.] Under these circumstances, it would seem, also, that Scoville's share should bear the burden of any failure to obtain the approval of the transaction by The Adamant Company. The remaining interest of Scoville is more than enough to satisfy the obligation, even if Adamant Company is not

bound by the agreement. Assuming it is not bound, the total production subject to the lien or charge of the agreement is as follows:

Walter B. Scoville	16% or	$30,672.00
Herschel Bullen and Mary H. Bullen	1% or	1,917.00
J. C. Hayward and Marian S. Hayward	1% or	1,917.00
	Total	$34,506.00

Of this total, an aggregate of $3,834.00 is owned by the appellants. If Scoville is not held responsible for failure to obtain Adamant's approval, there should be deducted $\frac{3,834}{34,506}$ of $10,000.00, or $1,111.11, and the remaining $8,888.89 should be charged to the share of Walter B. Scoville. If Scoville's share is to be charged with the effect of the failure to obtain Adamant's signature, there would be deducted for appellants' share the same amount as if Adamant had signed, and the resulting charges would be:

To the appellants	$ 465.11
To Walter B. Scoville	9,534.89
Total	$10,000.00

Conclusion.

It is submitted that the judgment of the Court below should be reversed; and that the mandate of this Court should direct that there be paid to the appellants from the money held by the court in the condemnation case the sum of $5,826.08 from the share of The Adamant Company and the sum of $3,708.81 from the share of Walter B. Scoville; or, if the Court finds that The Adamant Company is not bound, that there should be paid to the appellants the sum of $9,534.89 from the share of Walter B. Scoville.

Respectfully submitted,

HOGE & PERRY,

By FULTON W. HOGE,

Attorneys for Appellants Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward.